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November 14, 1997

By Hand Delivery

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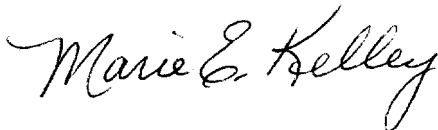
Re: Reply Comments of
the Telecommunications Resellers Association
CC Docket No. 97-208

Dear Ms. Salas:

Pursuant to the Public Notice, FCC 97-330, (released September 19, 1997), transmitted herewith, on behalf of the Telecommunications Resellers Association ("TRA"), are an original and eleven (11) copies of TRA's Reply Comments, and a 3½" diskette containing TRA's Reply Comments in WordPerfect for Windows 5.1 format.

If you should have any questions concerning this matter, please do not hesitate to contact the undersigned.

Respectfully submitted,



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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In The Matter of

**APPLICATION OF BELLSOUTH
CORPORATION, BELLSOUTH
TELECOMMUNICATIONS, INC. AND
BELLSOUTH LONG DISTANCE, INC.
FOR PROVISION OF IN-REGION,
INTERLATA SERVICES IN SOUTH
CAROLINA**

CC Docket No. 97-208

**REPLY COMMENTS
OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

**TELECOMMUNICATIONS
RESELLERS ASSOCIATION**

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**REPLY COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Public Notice, DA 97-2112 (released September 30, 1997), hereby replies to the comments of Ameritech and U S WEST, Inc. ("U S WEST") filed in support of the application ("Application") of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (collectively "BellSouth") under Section 271(d) of the Communications Act of 1934 ("Communications Act"),¹ as amended by Section 151 of the Telecommunications Act of 1996 ("Telecommunications Act")² for authority to provide interLATA service "originating" within the BellSouth "in-region State" of South Carolina.

¹ 47 U.S.C. § 271(d).

² Pub. L. No. 104-104, 110 Stat. 56, § 151 (1996).

I.

INTRODUCTION

In its Opposition to the BellSouth Application,³ TRA urged the Commission to deny BellSouth the authority it seeks to "originate" interLATA services within its "in-region State" of South Carolina. As TRA demonstrated in its Opposition, BellSouth has failed not only to satisfy the threshold requirements set forth in Section 271(c) for Bell Operating Company ("BOC") provision of "in-region," interLATA service,⁴ but to demonstrate that grant of the authorization it seeks here would be consistent with the public interest, convenience and necessity, as required by Section 271(d)(3)(C).⁵ Specifically, TRA demonstrated that BellSouth is not eligible to proceed under "Track B" because it has received multiple qualifying requests for network access/interconnection from carriers which individually or in combination intend to serve both business and residential users using their own facilities or network elements obtained from BellSouth on an unbundled basis, and cannot satisfy the more demanding "Track A" standard because it is not yet facing facilities-based competition in the State of South Carolina. Moreover, TRA showed that BellSouth has not fully satisfied the 14-point "competitive checklist," having, among other things, (i) elected to unlawfully restrict the resale of contract service arrangements, (ii) failed to establish that its wholesale discounts reflect reasonably avoided retail costs determined through an appropriate cost study and are final, as opposed to interim, values, (iii) failed to demonstrate that its operations

³ "Opposition of the Telecommunications Resellers Association" filed in CC Docket No. 97-208 (filed October 20, 1997).

⁴ 47 U.S.C. § 271(c).

⁵ 47 U.S.C. § 271(d)(3)(C).

support systems ("OSS") interfaces and functionalities have been adequately sized and sufficiently tested, and render adequate access to unbundled network elements and wholesale service offerings, (iv) proposed to charge separately for vertical features that are encompassed within the local switching element in contravention of Commission determinations to the contrary, and (v) failed to establish that its rates and charges for unbundled network access reflect forward-looking economic costs determined using a total element long run incremental cost ("TELRIC") pricing methodology and reflect final values. Finally, TRA emphasized that BellSouth has evidenced a clear intent to disregard Commission policies and rules with which it disagrees.

Ameritech and U S WEST, while not directly advocating grant of the BellSouth Application, urge the Commission to reach certain conclusions regarding the showings BOCs must make to warrant grant of "in-region," interLATA authority under Section 271(d)(3). Among other things, Ameritech and U S WEST contend that (i) BellSouth may proceed under "Track B" because new market entrants have purportedly not taken "reasonable steps" toward providing facilities-based local exchange service to both residential and business users,⁶ and (ii) the Commission is foreclosed from considering BellSouth's failure to make available to new market entrants existing combinations of network elements.⁷ TRA disagrees with each of these contentions.

⁶ Comments of Ameritech at 3 - 8; Comments of U S WEST at 3 - 12.

⁷ Comments of Ameritech at 8 - 11; Comments of U S WEST at 12 - 17.

II.

ARGUMENT

A. BellSouth is Precluded from Proceeding Under "Track B"

Both Ameritech and U S WEST support BellSouth's contention that it is entitled to proceed under the less demanding "Track B" compliance option despite its receipt of numerous requests for network access/interconnection. U S WEST simply echoes BellSouth's claims that "no potential competitors are taking reasonable steps toward providing facilities-based services to business and residential customers,"⁸ asserting that the Commission should defer to the assessment of the South Carolina Public Service Commission ("SCPSC") as to the whether a "qualifying request" has been received by BellSouth. Ameritech recommends that the Commission predicate its determination "on the existence and nature of any implementation schedules in the interconnection agreements between the BOC and potential competitors," arguing that "[i]f there are no implementation schedules in the agreements, or if any implementation schedules do not require the competitors to become facilities-based providers 'in a timely fashion,' then Track B should remain open to the BOC."⁹ TRA submits that Ameritech's and U S WEST's protestations to the contrary notwithstanding, "Track B" is foreclosed to BellSouth in the State of South Carolina.

The Commission has articulated the standards applicable to the determination of what constitutes a qualifying interconnection request under "Track A," holding that "such a request need not be made by an operational competing provider . . . rather, the qualifying request may be

⁸ Brief in Support of Application of BellSouth for Provision of In-region, InterLATA Service in South Carolina at 10 ("BellSouth Brief").

⁹ Comments of Ameritech at 4 - 5.

submitted by a potential provider of telephone exchange service to residential and business subscriber."¹⁰ It is sufficient that "the request from a potential competitor must be one that, *if implemented*, will satisfy section 271(c)(1)(A)."¹¹ In light of the Commission's clear indication that "[b]y its terms, Track B is only available in the event the BOC fails to receive a qualifying request for access and interconnection,"¹² the contentions of BellSouth, U S West and Ameritech that no "qualifying request" has been received could only be supported by the showing, not possible here, that none of the entities with which BellSouth has entered into network access/interconnection agreements intend to provide facilities-based local service to residential customers in the State of South Carolina. Such a showing is essential if BellSouth's Application is to be evaluated under "Track B" because a number of the interconnection agreements which form a part of this record, *if BellSouth were to satisfy the competitive checklist in good faith*, would permit competitive providers to offer both residential and commercial facilities-based service in South Carolina sufficient to satisfy Section 271(c)(1)(A).

The Department of Justice ("DOJ" or "Department") has found itself unable to adequately evaluate BellSouth's eligibility for "Track B" entry, noting that "the record contains little evidence on a key factual question necessary"¹³ to determine the availability of "Track B" to BellSouth -- namely, whether BellSouth has indeed received a "qualifying request" from a potential

¹⁰ Application of SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma, CC Docket No. 97-121, FCC 97-228, ¶ 15 (June 26, 1997), , *pet. for rev. pending sub nom. SBC Communications Corp. v. FCC*, Case No. 97-1425 (D.C. Cir. July 3, 1997).

¹¹ Id. at ¶ 54.

¹² Id. at ¶ 59.

¹³ Comments of DOJ at 5.

competitor. The SCPSC's conclusion that BellSouth's potential competitors were not taking reasonable steps to serve both business and residential customers is, in the view of the Department, "of limited value" not only because the State Commission specifically declined to undertake an analysis of BellSouth's ability to satisfy entry under either "Track A" or "Track B," but also because "DeltaCom's statements concerning its plan to provide business and residential service in South Carolina were not in the record before the SCPSC."¹⁴ TRA believes that DeltaCom's intentions were sufficiently before the Commission if through no other vehicle than BellSouth's intentionally low-key admission in its Brief that DeltaCom (and perhaps others) have "begun to offer facilities-based service to residential as well as business subscribers in South Carolina."¹⁵ TRA, however, fully supports the Department's suggestion that, in light of the dearth of information in the paper record, the Commission should utilize information provided by the parties commenting on the BellSouth Application to enhance its ability to evaluate BellSouth's eligibility for "Track B" entry.

What the record so compiled reveals is a history of unfulfilled requests by new market entrants to BellSouth, and the repeated thwarting of efforts by potential competitors to provide facilities-based commercial and residential service by BellSouth. For example, AT&T Corp ("AT&T"), which has doggedly pursued efforts to enter the South Carolina local exchange market virtually the passage of the 1996 Act, has unequivocally "confirmed and amplified [its] intention to serve *residential* and business customers." According to AT&T, however, "had BellSouth been willing to implement it," AT&T's interconnection requests would have resulted in the provision in

¹⁴ Id. at 11.

¹⁵ BellSouth Brief at 15 - 17.

South Carolina of precisely "the type of telephone exchange service described in section 271(c)(1)(A)."¹⁶

American Communications Services, Inc.'s ("ACSI") construction of a fiber network in South Carolina, coupled with its anticipated provision of local dialtone utilizing its own switch by early in 1998 also undercuts BellSouth's sweeping assertion that it has received no "qualifying requests" from competitors. As numerous parties note, and as BellSouth itself conceded in its Application, competitors such as ITC DeltaCom ("DeltaCom") have taken steps to initiate facilities-based residential service offerings.¹⁷ For its own part, DeltaCom has

publicly announced its intention to offer local exchange service through its service area, including South Carolina . . . DeltaCom has been financially committed to provide wire-line residential and business local exchange services throughout the State of South Carolina and has been engaged in reasonable efforts to do so for some time . . . it intends to do so under its South Carolina business plan, either through the use of a network entirely owned by DeltaCom, should BellSouth continue to fall short of meeting the Act's competitive checklist, or through partial use of BellSouth facilities, should the checklist terms be met in the foreseeable future. In either event, DeltaCom plans to provide facilities-based residential and business services on a widespread basis in South Carolina in the foreseeable future.¹⁸

This clear indication of BellSouth's competitors desire to serve both residential and commercial customers in South Carolina on a facilities basis is sufficient in its own right to defeat BellSouth's, Ameritech's and U S WEST's "no qualifying requests" mantra. The Commission, however, is told more. The record reveals that, while it is true that facilities-based competition

¹⁶ Comments of AT&T at 50 (emphasis added).

¹⁷ BellSouth Brief at 15 - 17; Comments of National Cable Television Association at 7 - 9; Comments of Association for Local Telecommunications Services at 7 - 8; Comments of AT&T at 52.

¹⁸ Affidavit of Steven D. Moses on Behalf of ITC DeltaCom, Inc., ¶¶ 21-22 (October 17, 1997).

sufficient to warrant BOC entry under "Track A" does not currently exist, facilities-based residential and commercial service is possible. MCI Telecommunications Corp. ("MCI"), for example, has informed the Commission that, despite the inadequacies in BellSouth's delivery unbundled network elements, it is providing residential service on a facilities basis in the State of South Carolina on a trial basis.¹⁹

BellSouth should not be permitted to benefit from its failure to fully comply with the "competitive checklist." The Commission has made clear that it will not allow the Section 271 application process to be "gamed." Thus, the Commission has declared that it will not permit potential competitors to "'game' the section 271 process by purposefully requesting interconnection that does not meet the requirements of section 271(c)(1)(A), but prevents the BOCs from using Track B."²⁰ The Commission, however, has also made clear that the "Track B" entry option will be available to a BOC only when "*through no fault of its own . . . it is unable to satisfy Track A.*"²¹

The Commission's view that a case-by-case assessment will be necessary and often require "difficult predictive judgment[s]" is right on point.²² Such an assessment, as the Commission has noted, should of course take into account "the incentive of local exchange competitors to delay the BOCs' entry into in-region interLATA services."²³ It should also, as the Commission has

¹⁹ Ex Parte letter to William F. Caton, from Kimberly M. Kirby, MCI Communications Corporation, October 16, 1997.

²⁰ Application of SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma, CC Docket No. 97-121, FCC 97-228 at ¶ 56

²¹ Id. at ¶ 55.

²² Id. at ¶ 57.

²³ Id.

recognized, account for "the BOCs' incentive to delay fulfillment of requests for access and interconnection."²⁴

Here it is readily apparent that BellSouth has received multiple "qualifying requests." The problem lies not with the failure of the new market entrants to take reasonable steps toward providing facilities-based services to business and residential customers; the problem lies in BellSouth's unwillingness to open its local exchange markets fully to competition.

Ameritech suggests that these "difficult predictive judgments" of what constitutes a "qualifying request" could be avoided through use of a "bright line" test. Under the Ameritech test unless implementation schedules incorporated into network access/interconnection agreements required new market entrants to become facilities-based providers 'in a timely fashion,' then Track B would remain open to BOCs. Apart from the clear potential for strategic manipulation, Ameritech's proposal would have the Commission renounce the role into which it has been cast by Congress, that is, the entity ultimately responsible for determining whether a BOC has satisfied the stringent requirements of Section 271.

Congress has imposed upon the Commission the responsibility of determining whether an applying BOC has met the requirements of Section 271(c)(1). Congress provided for consultation by the Commission with DOJ and the State Commissions, but delegated to the Commission the ultimate obligation of approving or denying each filed BOC application for "in-region," interLATA authority. While acknowledging the difficulties inherent in the task it has been assigned, the Commission has also recognized that "[t]he fact that a determination, such as the one [that] . . . must . . . [be made] here, may be complex does not mean the Commission may avoid its

statutory duty to undertake it."²⁵ In fulfilling its statutory duty, the Commission must apply its expert judgment, not rely upon a mechanical test.

Moreover, mechanical reliance upon a new market entrant's compliance with an implementation schedule incorporated into a network access/interconnection agreement to determine "Track A" eligibility would stand as an open invitation for strategic manipulation of the market entry process. A BOC would be rewarded for hindering the competitive availability of service by retaining its eligibility to proceed under the less demanding "Track B" compliance vehicle. Certainly, given the BOC's record of non-compliance with the "competitive checklist" to date, this is an incentive that should clearly be avoided. Allegations of strategic manipulation would require the same difficult judgments Ameritech's "brightline test" purportedly was designed to avoid.

Finally, efforts to obtain interconnection agreements have been ongoing since virtually the moment the 1996 Act was enacted. Nothing in the 1996 Act itself, and nothing in the Commission's statements interpreting or implementing the provisions of the 1996 Act, places any obligation upon either new market entrants to enter into specific implementation schedules in connection with the commercial provision of service to either residential or business customers. And as Ameritech is doubtless aware, many existent interconnection agreements do not contain such schedules. Thus, Ameritech seeks to establish a standard which BOCs can meet by default. Adoption of such an evidentiary presumption would not only directly contradict the Commission's holding that "the ultimate burden of proof with respect to factual issues remains at all times with the

BOC, even if no party opposes the BOC's application,"²⁶ but it would result in widespread unjustified use of "Track B."

B. The Commission may Consider a BOC's Failure to Make Available to New Market Entrants Existing Combinations of Network Elements

Both Ameritech and U S WEST argue that the Commission is precluded by the U.S. Court of Appeals for the Eighth Circuit's ("Eighth Circuit") *Order on Petitions for Rehearing in Iowa Utilities Board v. FCC*, No. 96-3321 (Oct. 14, 1997), from considering in its evaluation of BellSouth's Application the carrier's admitted failure to make available to new market entrants existing combinations of network elements. Although strongly disagreeing with the Eighth Circuit's reading of Section 251(c)(3), TRA acknowledges that the Court held that Section 251(c)(3) does not require incumbent local exchange carriers ("LECs") to make available "assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements)." This ruling, however, does not foreclose consideration by the Commission of a BOC's failure to make available existing combinations of network elements. Rather, it simply precludes the Commission from directing an incumbent LEC to do so.

As the Commission has properly recognized, "[S]ection 271 grants the Commission broad discretion to identify and weigh all relevant factors in determining whether BOC entry into

²⁶ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 43, citing Application of SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma, CC Docket No. 97-121, FCC 97-228 at ¶ 13.

a particular in-region, interLATA market is consistent with the public interest."²⁷ "Courts have long held that the Commission has broad discretion in undertaking such public interest analyses," and "[t]he legislative history of the public interest requirement in section 271 indicates that Congress intended the Commission, in evaluating section 271 applications, to perform its traditionally broad public interest analysis of whether a proposed action or authorization would further the purposes of the Communications Act."²⁸ It is thus clear that "Congress granted the Commission broad discretion under the public interest requirement in section 271 to consider factors relevant to the achievement of the goals and objectives of the 1996 Act."²⁹

"The 1996 Act's overriding goal is to open all telecommunications markets to competition."³⁰ Congress "sought to open local telecommunications markets to previously precluded competitors not only by removing legislative and regulatory impediments to competition, but also by reducing inherent economic and operational advantages possessed by incumbents."³¹ Recognizing, however, that BOCs "have little, if any, incentive to assist new entrants in their efforts to secure a share of the BOCs' markets," the Congress embodied in Section 271 "a critically

²⁷ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298, ¶ 383 (Aug. 19, 1997).

²⁸ Id. at ¶¶ 384, 385.

²⁹ Id. at ¶ 385.

³⁰ Id. at ¶ 10.

³¹ Id. at ¶ 13.

important incentive for BOCs to cooperate in introducing competition in their historically monopolized local telecommunications markets."³²

To facilitate competitive entry into the local exchange market, Congress "require[d] incumbent LECs, including BOCs, to share their networks in a manner that enables competitors to choose among three methods of entry into local telecommunications markets, including those methods that do not require a new entrant, as an initial matter, to duplicate the incumbent's networks."³³ Recognizing that new market entrants "will adopt different entry strategies that rely to varying degrees on the facilities and services of the incumbent and that such strategies are likely to evolve over time," Congress "did not explicitly or implicitly express a preference for one particular entry strategy, but rather sought to ensure that all procompetitive entry strategies are available."³⁴ The Commission's "public interest analysis of a section 271 application, consequentially, must include an assessment of whether all procompetitive entry strategies are available to new entrants."³⁵

The Commission has made clear that mere compliance with the "competitive checklist" is not sufficient to establish that grant of "in-region," interLATA authority to a BOC is consistent with the public interest, convenience and necessity. As reasoned by the Commission, "Congress' adoption of the public interest requirement as a separate condition for BOC entry into the in-region, interLATA market demonstrates that Congress did not believe that compliance with

³² Id. at ¶ 14.

³³ Id. at ¶ 13.

³⁴ Id. at ¶ 387

³⁵ Id.

the checklist alone would be sufficient to justify approval under section 271."³⁶ Thus, the Commission has signaled that it will make a "case-by-case" determination . . . examin[ing] a variety of factors in each case . . . [including whether] the various methods of entry contemplated by the 1996 Act . . . [are] truly available."³⁷

The Commission has found that "the ability of new entrants to use unbundled network elements, as well as combinations of unbundled network elements, is integral to achieving Congress's objective of promoting competition in the local telecommunications market."³⁸ The Commission has further correctly concluded that "limitations on access to combinations of unbundled network elements would seriously inhibit the ability of potential competitors to enter local telecommunications markets through the use of unbundled elements, and would therefore significantly impede the development of local exchange competition."³⁹ As the Commission explained, "in practice, it would be impossible for new entrants that lack facilities and information about the incumbent's network to combine unbundled elements from the incumbent's network without the assistance of the incumbent." Moreover, as the Commission has noted, "dismantling of

³⁶ Id. at ¶ 13.

³⁷ Id. at ¶ 13.

³⁸ Id. at ¶ 332.

³⁹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, ¶¶ 10 - 23 (1996) ("Local Competition First Report and Order"), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.*, FCC 97-295 (Oct. 2, 1997), *aff'd in part, vacated in part sub. nom. Iowa Utilities Board v. FCC*, Case No. 96-3321, 1997 WL 403401 (8th Cir. July 18, 1997) ("Iowa Utilities Board"), *rehearing* (Oct. 14, 1997), *pet. for rev. pending sub. nom., Southwestern Bell Telephone Co. v. FCC*, Case No. 97-3389 (Sept. 5, 1997).

network elements, absent an affirmative request, would increase the costs of requesting carriers and delay their entry into the local exchange market, without serving any apparent public benefit."⁴⁰

In short, the Commission has found that the public interest lies in opening the local exchange market to competition and that access to combinations of unbundled network elements is integral to achieving this goal. The Commission has recognized that Congress intended for it to exercise broad discretion in structuring and conducting its public interest analysis under Section 271, and that such analysis must include an assessment of whether all three of the market entry vehicles made available in the 1996 Act are truly available. And the Commission has concluded that permitting BOCs to dismantle existing network platforms before providing them to new market entrants as unbundled network elements would seriously diminish the viability of unbundled network elements as a market entry option. Given these predicates, the Commission would certainly be on solid ground in considering a BOC's failure to make available to new market entrants existing combinations of network elements in assessing whether the public interest would be served in granting the BOC authority to enter the "in-region," interLATA market.

⁴⁰ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 97-295 (Aug. 18, 1997), *pet. for rev. pending sub. nom.*, Southwestern Bell Telephone Co. v. FCC, Case No. 97-3389 (Sept. 5, 1997).

III.

CONCLUSION

By reason of the foregoing and its earlier-filed Opposition, the Telecommunications Resellers Association once again urges the Commission to deny the Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. under Section 271(d) of the Communications Act, as amended by Section 151 of the Telecommunications Act to provide interLATA service within the "in-region State" of South Carolina.

Respectfully submitted,

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